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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

### Office Action Summary

**Application No.**

10/730,218

**Applicant(s)**

SPADINI ET AL.

**Examiner**

CHARLESWORTH RAE

**Art Unit**

1611

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 08 August 2008.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1, 3-6, 9, 11-16 and 18-39 is/are pending in the application.
- 4a) Of the above claim(s) 18-39 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1, 3-6, 9, and 11-16 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SF/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

## DETAILED ACTION

Applicant's arguments, filed 08/08/08, have been fully considered but they are not deemed to be persuasive. Rejections and/or objections not reiterated from previous office actions are hereby withdrawn. The following rejections and/or objections are either reiterated or newly applied. They constitute the complete set of actions being applied to the instant application.

### Status of the Claims

Claims 1, 3-6, 9, 11-16, 18-39 are currently pending in this application.

Claims 18-39 are withdrawn for examination purposes for being directed to non-elected subject matter.

Claims 1, 3-6, 9, 11-16 are under examination.

### Claim Amendment

The amendment received 08/08/08 is acknowledged and made of record.

### Response to applicant's arguments/remarks

#### Rejection under 103 (a)

These rejections are being withdrawn. Although the bases of the rejections have been altered, the merits of the previously cited references are maintained.

#### Rejection under 112, 2<sup>nd</sup> paragraph

This rejection is withdrawn in view of the claim amendment.

## REJECTIONS

**Claim rejections – 35 USC 103(a)**

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 1, 2-6, 9, 11-16 are rejected under 103(a) as being unpatentable over Beerse et al. (US Patent 6,294,186 B1).

It is noted that this rejection is being made under 103(a) because one would not immediately envisage the instant claimed invention based on the teaching of Beerse et al.

Claim 1 is directed towards "[a] skin care or cleansing composition; Beerse et al. teach topical antimicrobial compositions for use as a personal cleansing products (col. 3, line 66 to col. 5, line 5). Claim 1 recites "(a) a dispersed phase;" Beerse et al. teach a dispersed phase (col. 12, lines 19-50; and col. 14, line 41 to col. 17, line 21 ). Claim 1 further recites that the dispersed phase includes "a first component, and a second component that is different from the first, the first component being capable of chemically reacting with the second component;" Beerse et al. teach compositions comprising "(a) a safe and effective amount of a benzoic acid analog; b) a safe and effective amount of a metal salt;" See col. 3, lines 33-40; Beerse et al. disclose that it is envisioned that the acid component may be added directly to the composition or that the acid may be formed in situ upon topical application of the composition ( col. 6, lines 53-59). Claim 1 also recites "(b) a continuous phase present in the composition composed of a substantially anhydrous carrier;" Beerse et al. teach a water-in-silicone emulsion composition, wherein the continuous phase is silicone (= an anhydrous carrier), and the dispersed phase is aqueous (col. 12, line 13 to col. 14, line 40). Claim 1 recites "(c) an organophilic particle stabilizer contained in the dispersed phase." Beerse et al. teach that lipophilic skin moisturizing agents/emollients may be incorporated into the **water or alcohol based solutions** and gel, including petroleum, micro-crystalline waxes, cerasin, ozokerite, dimethicones, lanolin wax, beeswax, carnauba and candelilla waxes

(col. 10, line 43 to col. 11, line 11); the hydrophilic skin moisturizing agent can optionally also be thickened using a thickening agent such as polyacrylates, fumed silica natural and synthetic waxes, alkyl silicone, aluminum silicate, hydrophobic clays, petroleum, hydrotalcites, and mixtures thereof (col. 11, lines 17-39).

Claim 3 recites "wherein the reaction of the first component with the second component is not polymerization." As noted in connection with claim 1, Beerse et al. disclose that it is envisioned that the acid component may be added directly to the composition or that the acid may be formed in situ upon topical application of the composition ( col. 6, lines 53-59).

Claim 6 recites "wherein the organophilic particle is selected from a waxy particle, organophilic clay, or blends thereof." See above discussion of claim 1.

Claim 9 recites "wherein the carrier may contain components that are polar, nonpolar or a blend thereof." Beerse et al. (US Patent 6,294,186) teach that the carrier may comprise an aqueous solution, wherein the aqueous solution may comprise from about 0% to about 98.8% by weight of the composition, of water (col. 9, lines 28-31). Beerse et al. teach a preferred embodiment wherein the carrier comprises an alcohol solution, and wherein the alcohol solution may be anhydrous or water containing (col. 9, lines 32-54). See also above discussion regarding claim 4 as it applies to the various ingredients that may be present in the dispersed phase.

Claim 11 recites "further comprising dispersed surfactants that are substantially unsolvated by the carrier." As noted above regarding claim 5, Beerse et al. teach emulsifiers such as silicone emulsifiers which are typically **organically modified**

organopolysiloxanes, which would be insoluble in an aqueous dispersed phase (= substantially unsolvated). Also, Beerse et al. teach that the aqueous phase can be water, or a combination of one or more water soluble or dispersible ingredients (col. 14, lines 54-59).

Claim 13 "wherein the first component is capable of producing a gas in aqueous solution when reacted with an acid and the second component is an acid or forms an acid in the presence of water." Beerse et al. exemplify a water-in-silicone emulsion, wherein salicylic acid, benzoic acid, and copper chloride are present in the aqueous dispersed phase (col. 51-52, Examples 16-18) and also teaches that other optional agents may be included in the composition (col. 42, line 1 to col. 43, line 29) Claim 14 recites "wherein the first component is capable of generating a peroxide compound when dissolved in water." Beerse et al. exemplify a water-in-silicone emulsion, wherein salicylic acid, benzoic acid, and copper chloride are present in the aqueous dispersed phase (col. 51-52, Examples 16-18) and also teaches that other optional agents may be included in the composition (col. 42, line 1 to col. 43, line 29). Also, Beerse et al exemplifies a composition comprising hydrogen peroxide (col. 56, lines 35-60, Example 33-35). Claim 15 recites "wherein the first component is capable of generating sulfide ions when reacted with an alkaline material and water." Beerse et al. teach odor control agents e.g. a water soluble metallic-salt can be used to absorb amine and sulfur-containing compounds e.g. copper salts, zinc salts, and mixtures thereof (col. 43, lines 30-64).

Claim 16 recites "wherein the carrier contains an oil, an emulsifier and wherein the stabilizer is an organophilic clay; and the composition contains a total of at least about 10% of reactive dispersed solids by weight." Beerse et al. teach emulsifying surfactants may be added to the composition in an amount from about 0% to 20%, wherein said emulsifying surfactant may be nonionic, anionic, or cationic (col. 11, line 40 to col. 12, line 12). See also the above discussion of claim 5.

Beerse et al. exemplify compositions to be applied to a person's skin (col. 51, lines 33-38). Beerse et al. exemplify a water-in-silicone emulsion, wherein salicylic acid, benzoic acid, and copper chloride are present in the aqueous dispersed phase (col. 51-52, Examples 16-18). Beerse et al. (US Patent 6,294,186) teach that the carrier may comprise an aqueous solution, wherein the aqueous solution may comprise from about 0% to about 98.8% by weight of the composition, of water (col. 9, lines 28-31). Beerse et al. teach a preferred embodiment wherein the carrier comprises an alcohol solution, wherein the alcohol solution may be anhydrous or water containing (col. 9, lines 32-54). Beerse et al. teach that preferably thickeners (e.g. naturally occurring polymeric materials such as sodium alginate) can be added to the water or alcohol based solutions to form a gel (col. 9, lines 55 to col. 10, line 6). Beerse et al. teach that lipophilic skin moisturizing agents/emollients may be incorporated into the water or alcohol based solutions and gel, including petroleum, micro-crystalline waxes, cerasin, ozokerite, dimethicones, lanolin wax, beeswax, carnauba and candelilla waxes (col. 10, line 43 to col. 11, line 11). Beerse et al. teach that the optionally, the hydrophilic skin



moisturizing agent can also be thickened using a thickening agent such as polacrylates, fumed silica natural and synthetic waxes, alkyl silicone, aluminum silicate, **hydrophobic clays**, petroleum, **hydrotalcites**, and mixtures thereof (col. 11, lines 17-39). Beerse et al. teach that a given component will distribute primarily into either the water or oil/silicone phase depending on the water solubility/dispersibility of the component in the composition (lines 13-20). Beerse et al. teach preferably the compositions comprise at least one emulsifying surfactant having an HLB value below 12 and at least one emulsifying surfactant having an HLB value of 12 or above (col. 11, line 17 to col. 12, line 34). Beerse et al. teach that the **dispersed aqueous phase** is a dispersion of small aqueous particles or droplets suspended in and surrounded by the continuous silicone phase, wherein the aqueous phase can be water and one or more water soluble or dispersible ingredients, including, but not limited to, thickeners, acids, bases, salts, chelants, gums, water-soluble or dispersible alcohols and polyols, buffers (col. 14, lines 54-59). Beerse et al. teach water-in-silicone emulsions, wherein the dispersed aqueous phase comprises an emulsifier for dispersing the aqueous phase (col. 14, line 65 to col. 17, line 21; see especially col. 15, lines 22-25). Beerse et al. teach that suitable emulsifiers include silicone and non-silicone-containing emulsifiers and that the silicone emulsifiers are typically **organically modified organo-polysiloxanes**, which are also known in the art as silicone surfactants (col. 15, line 6-25). Beerse et al. also teach other surfactants, including anionic, cationic and nonionic surfactants (col. 22, line 37 to col. 25, line 4). Beerse et al. also teach that the compositions may optionally include odor control agents, including uncomplexed

cyclodextrins and highly water soluble cyclodextrins (col. 42, line 1 to col. 43, line 29); the odor control agents may also include e.g. a water soluble metallic-salt can be used to absorb amine and sulfur-containing compounds e.g. copper salts, zinc salts, and mixtures thereof (col. 43, lines 30-64). Also, Beerse et al. teach anti-wrinkle actives/anti-atrophy actives, including sulfur containing D and L-amino acids and their derivatives and salts, particularly N-acetyl derivatives; hydroxy acids; and skin peel agents such as phenol and retinoids (col., 28, line 49 to col. 30, line 23). Beerse et al. also teach desquamation actives comprising sulhydryl compounds for enhancing the appearance of the skin (col. 28, lines 17-40). As noted above, Beerse et al. teach detackifying agents, means an agent which prevents, reduces and/or eliminates the sticky or tacky feeling, wherein said detackifying agent is a wax material soluble in preferred alcohol carriers and having a melting point greater than about 20 degrees Centigrade – select silicones (col. 38, line 32 to col. 41, lines 67). Beerse et al. (US Patent 6,294,186 B1) teach that antimicrobial compositions comprising benzoic acid analog and metal salt complex forms a metal-acid complex in the composition, which provides a synergistic immediate and residual anti-viral and antibacterial efficacy to surfaces to which such compositions are applied and that **it is envisioned that the acid component may be added directly to the compositions or may be formed upon topical application of the composition i.e. precursors of the acid (e.g. an ester of the acid) may be added t the compositions which ultimately transforms into the desired acid** (col. 6, lines 53-59; col. 7, lines 59-65). Beerse et al. discloses compositions comprising carriers in an amount of from about 50% to 99.9%, wherein the carrier can be in a wide

variety of forms, including an aqueous-based solution or cleanser, an alcohol-based solution or gel or an emulsion carrier, and further wherein the carrier solution containing the benzoic acid analog and metal salt can be applied directly to the surface to be treated or delivered via a suitable substrate; an aqueous carrier may comprise from about 0% to about 98%, by weight of the composition, of water (col. 8, lines 16-48; and col. 9, lines 28-31). Beerse et al. teach that dermatologically acceptable carriers can be, for example, formulated as alcohol or water-based hand cleansers, toilet bars, liquid soaps, shampoos, and bath gels; leave-on systems or products are preferred (col. 8, lines 39-48). Beerse et al. teach alcohol solution carrier as being a preferred carrier, wherein suitable alcohols include, but not limited to, monohydric alcohols, dihydric alcohols, and combinations thereof; compositions comprising an alcohol solution-based carrier may be **anhydrous** or water containing (col. 9, lines 32-54). In addition, Beerse et al. teach cleansing compositions comprising a **dermatologically acceptable surfactant** (e.g. isoceteth-20, sodium methyl cocoyl taurate, sodium oleyl taurate, and sodium lauryl sulfate) in an amount of from about 1% to about 90 % (col. 8, line 49 to col. 9, line3). Beerse et al. teach **emulsifying surfactants** may be added to the composition in an amount from about 0% to 20%, wherein said emulsifying surfactant may be nonionic, anionic, or cationic (col. 11, line 40 to col 12, line 12). Beerse et al. teach that suitable emulsions may include oil-in-water emulsions, water-in-oil emulsions, and water-in-silicone emulsions, wherein said emulsions generally contain a lipid or oil (e.g. lipid and oils derived from animals, plants, or petroleum), a humectant (e.g. glycerin), and an anti-foaming agent (e.g. high molecular weight silicones. Beerse et al.

teach that anionic surfactants are preferred, wherein said anionic surfactants includes a wide variety of agents e.g. alkyl and alkyl ether sulfates, sulfated monoglycerides, sulfonated olefins, alkyl aryl sulfonates, primary or secondary alkane sulfonates, alkyl sulfosuccinates (col. 18, lines 18-29; col. 22, line 46 to col. 25, line 4; and col. 27, line 56 to col. 28, line 16). Also, Beerse et al. teach compositions comprising odor control agents (e.g. silica gel, silica molecular sieves, montmorillonite, smectite, attapulgite, bentonite, palygorskite, kaolinite, hectorite, activated charcoal or activated carbon) in an amount of from about 0.1% to about 10% (col. 42, line 1 to col. 43, line 29), and detackifying agents to reduce or prevent the sticky or tacky feeling typically associated with humectants, wherein said detackifying agent consists of a wax material soluble in an alcohol carrier at 25 degrees Centigrade in a concentration preferably of 0.1% to 10% (e.g. polyoxyethylene glycols having a weight average molecular weight greater than about 500 such as Biowax and PEG-32 (col. 38, line 32 to col. 41, line 67 ).

Although Beerse et al. teach water-in-silicone compositions comprising (a) a first component (e.g. benzoic acid) and a second component (e.g. metal salt such as copper chloride), (b) a continuous phase composed of a substantially anhydrous carrier (= silicone), (c) detackifying agents such as **wax materials** (e.g. Biowax and PEG-32), wherein said waxy materials have a melting point greater than 20 degrees Centigrade and are soluble in alcohol at 25 degrees Centigrade, (d) odor control agents such as **organophilic particles** (e.g. bentonite, hydrophobic clays, organically modified organo-polysiloxanes), and (e) anionic surfactants in amounts, this reference does not exemplify the instant invention.

It is noted that the instant application discloses that the term "*chemically reacting*" is not limited to gas formation, redox reactions, lysis (e.g. hydrolysis and perhydrolysis), bond cleavage and the like, but does not include reactions or interactions that manifest themselves solely by (1) color formation or color change, (2) self-polymerization, (3) exothermic or endothermic solvation processes, or a combination of these factors (specification, page 3, lines 12-20).

It would have been obvious to a person of skill in the art at the time the invention was made based on the teaching of Beerse et al. to formulate a water-in-silicone composition, wherein the dispersed phase is aqueous, and the continuous phase silicone, and wherein the dispersed phase comprise a benzoic acid analog and a metal salt, an organophilic particle (e.g. organically modified organo-polysiloxane, or bentonite), and other optional actives (e.g. a component capable of producing a gas, or a component capable of generating a peroxide compound when dissolve in water, or a component capable of generating sulfide ions when reacted with an alkaline material in water). Further, Beerse et al. teaches active ingredients can be metal salts (e.g. copper chloride = first component) and benzoic acid (= second component), which are both soluble actives such that one would reasonably expect that these active components would be present in the aqueous dispersed phase. Also, Beerse et al. teach other actives, including cyclodextrins (e.g. uncomplexed cyclodextrin), which are also water soluble, which are also capable of reacting with one or more other components. Furthermore, Beerse et al. suggest compositions comprising combination of the active ingredients as evidenced by the examples teaching water-in-silicone compositions

comprising a combination of benzoic acid and copper chloride (cols. 51-52, Examples 14-18). Hence, the cited art teaches all of the instant claimed limitations and is therefore capable of performing the intended function.

It is noted that ingredients encompassed by the prior art are capable of chemically reacting with a different component as evidenced by the teaching of Beerse et al. that benzoic acid analog and metal salt complex forms a metal-acid complex in the composition, which provides a synergistic immediate and residual anti-viral and antibacterial efficacy to surfaces to which such compositions are applied and that it is envisioned that the acid component may be added directly to the compositions or may be formed upon topical application of the composition i.e. precursors of the acid (e.g. an ester of the acid) may be added to the compositions which ultimately transforms into the desired acid (col. 6, lines 53-59; col. 7, lines 59-65).

With respect to the limitation regarding organophilic particle stabilizer contained in the dispersed phase (Beerse teaches the dispersed phase as the aqueous phase), Beerse et al. suggest that other ingredients may be present in the dispersed phase, including **wax materials** (e.g. Biowax and PEG-32), wherein said waxy materials have a melting point greater than 20 degrees Centigrade and are soluble in alcohol at 25 degrees Centigrade, **organophilic** particles such as bentonite, hydrophobic clays, and organically modified organo-polysiloxanes, polacrylates, fumed silica natural and synthetic waxes, alkyl silicone, aluminum silicate, **hydrophobic clays**, petroleum, **hydrotalcites**, as noted above, which are capable of performing the intended function (See claim 1).

Further, the limitation recited in claim 3 is satisfied by the cited art as evidenced by the fact that benzoic acid and copper chloride are capable of chemically reacting with each other, which does not involve polymerization (see above claim 3 summary).

It is also noted that silicone constitutes the continuous phase of the water-in-silicone composition exemplified by Beerse et al. and silicone is substantially anhydrous.

It is noted that the limitations recited in claims 6, 9, and 16 overlap with the teaching of Beerse et al.

It is noted the term *"wherein the first component is substantially unsolvated in the carrier,"* given its broadest reasonable possible interpretation, is reasonably satisfied by the teaching of Beerse et al. of water soluble actives in the dispersed phase of the water-in-silicone composition, wherein the silicone constitute the oil phase or continuous phase as evidenced by the teaching of Beerse et al. that the **dispersed aqueous phase** is a dispersion of small aqueous particles or droplets suspended in and surrounded by the continuous silicone phase, wherein the aqueous phase can be water and one or more water soluble or dispersible ingredients, including, but not limited to, thickeners, acids, bases, salts, chelants, gums, water-soluble or dispersible alcohols and polyols, buffers (col. 14, lines 54-59). See claim 11.

With respect to the limitation regarding the *"anionic surfactant in a concentration of at least 2% by weight when the organophilic particle stabilizer consists solely of waxy particles"* as recited in claim 1, it is noted that this limitation is optional and Beerse et al.

do not teach compositions requiring organophilic particle stabilizer consisting solely of waxy particles.

With respect to the limitation “f” as recited in claim 1, it is noted that the instant invention is directed to a product and not a method of using the product (see above claim 1 summary). Therefore, the intended use limitation recited in “f” does not confer patentable weight to the product. However, the examiner has given weight to the intended use limitation wherein it confers a structural limitation. In the instant case, the claims only require two components that are capable of interacting and Beerse et. al. teach that a benzoic acid analog and metal salt will complex (= chemically interact) to form a metal-acid complex in the composition. Further, Beerse et al. teach that it is envisioned that the acid component may be added directly to the compositions or may be formed upon topical application of the composition (col. 6, lines 53-59; col. 7, lines 59-65).

It is the examiner's position that it would have been within the scope of knowledge and skill of an artisan skilled in the art at the time of the invention to combine the actives encompassed by Beerse et al. to arrive at the instant claimed invention without resorting to undue experimentation.

With respect to claim 16, Beerse et al. teach compositions comprising odor control agents including montmorillonite, smectite, attapulgite, bentonite, palygorskite, kaolinite, hectorite, in an amount of from about 0.1% to about 10%, which reads on the limitation “wherein the stabilizer is an organophilic clay, and the composition contains a



total of at least about 10% of reactive dispersed solids by wt" (col. 42, line 1 to col. 43, line 29).

Thus, it would have been obvious to a person of skill in the art at time the invention was made to create the instant claimed invention with reasonable predictability.

**Claims 4 and 5 are rejected under 103(a) as being unpatentable over Beerse et al. (US Patent 6,294,186 B1), in view of Nakagaki et al. (US Patent 6,451,327; already made of record by applicant 12/08/03).**

Claim 4 recites "wherein the at least one reactive component has a particle size range of about 0.5 to 5000  $\mu$ ."

Claim 5 recites "wherein the organophilic particle is in the particle size range of about 0.02 to 250  $\mu$ ."

Although Beerse teaches cleansing antimicrobial products comprising detackifying agents to prevent, reduce and/or eliminate the sticky or tacky feeling wherein said detackifying agent is a wax material soluble in preferred alcohol carriers and having a melting point greater than about 20 degrees Centigrade, wherein the wax material may be a silicone wax, and silicone emulsifiers which are typically **organically modified organopolysiloxanes** (i.e. silicone surfactants (col. 15, line 6-25; and col. 38, line 32 to col. 41, lines 67), this reference does not expressly teach compositions

comprising the instantly claimed particulate components having the particle size as recited in claims 4 and 5.

Nakagaki et al. teach a substantially nonaqueous skin cleansing composition comprising a granulated product obtained by granulating particles of a surfactant selected from the group consisting of anionic, amphoteric and anionic surfactants with a binder, wherein the particles of surfactant preferably having a diameter of 0.01 to 1,000  $\mu\text{m}$  to provide a provide an effective massaged feeling and cleanability (col. 1, line 34 to col. 2, line 40). Nakagaki et al. teach binders for use with the surfactant, including bentonite, silica, talc, kaolin (col. 2, line 41-53). Nakagaki et al. teach anionic surfactants, including organic ammonium salts such as monoethnaol ammonium salt (col. 2, lines 17-40).

It would have been obvious to a person of skill in the art at the time the invention was made to combine the cited references by adding a surfactant granulating particle having a diameter of 0.01 to 1,000  $\mu\text{m}$  as taught by Nakagaki to the composition taught by Beerse et al. for its massaged feel and additive cleansing effect. One would have been motivated to do so because both Beerse et al. and Nakagaki et al. teach skin cleansing compositions and Nakagaki et al. suggest compositions comprising granulating surfactant particles provide an effective massaged feeling and has excellent cleanability. Besides, the motivation for combining the components flows from their individually known common utility (see In re Kerkhoven, 205 USPQ 1069 (CCPPA 1980).

It is noted that the instantly claimed particle size range overlaps with the particle size range taught by Nakagaki. Further, it is also noted that one would reasonably expect that a combination of an organic ammonium salt surfactant with a clay (e.g. bentonite) would result in an organophilic particle having a diameter of 0.01 to 1,000  $\mu\text{m}$ .

Thus, it would have been obvious to a person of skill in the art at the time the invention was made to create the instant claimed invention with reasonable predictability.

**Claim 12 are rejected under 103(a) as being unpatentable over Beerse et al. (US Patent 6,294,186 B1), in view of Puvvada et al. (US Patent 5,952,286).**

Claim 12 recites "further comprising structuring agents that form lamellar, hexagonal, or cubic surfactant phases upon contact with water at 25°C."

Although Beerse et al. teach a preferred oil-in-water emulsion comprising a structuring agent to assist in providing rheological characteristics wherein the structuring agent may also function as an emulsifier or surfactant, this reference does not teach water-in-oil compositions comprising structuring agents to form "*lamellar, hexagonal, or cubic surfactant phases upon contact with water at 25 degrees C*" as recited in claim 12.

Puvvada et al. teach lamellar, spherical and rod-like micelles for use in formulating cleansing compositions (col. 1, line 27 to col. 2, line 30). Puvvada et al. also

teach that unexpectedly, it has been found that certain liquid fatty acids or derivatives used in a typical rod-micellar solution, can induce a lamellar phase (col. 2, lines 31-63). Puvvada et al. teach that such lamellar phase compositions are preferred because they can readily suspend particles such as emollient particles and yet readily pour out (col. 3, line 57 to col. 4, line 3). Puvvada et al. also teach compositions comprising structurants such as carbomers (e.g. Carbopol), clays, and unsaturated and/or branchend long chain (C8-C24) liquid fatty acid or ester derivatives; short chain saturated fatty acid such as capric acid or caprylic may also be employed (col. 8, lines 17-55). Puvvada et al. teach that structuring agent may be defined as having a melting point below about 25 degrees Centigrade (col. 8, lines 53-54).

It would have been obvious to a person of skill in the art at the time the invention was made to combine the teachings of the cited references by adding a structurant as taught by Puvvada et al. to the composition as taught by Beerse et al. to form lamellar, surfactant phases upon contact with water at 25 degrees C. One would have been motivated to do so because Puvvada et al. suggest cleansing compositions comprising structuring agents, wherein the structurant agent is defined as having a melting point below about 25 degrees C, to form lamellar phase which enables the composition to suspend particles more readily (e.g. emollient particles) while still maintaining good shear thinning properties; lamellar phase also provide consumers with desired rheology ("heaping"). See col. 8, lines 19-55, especially lines 19-26. One would have expected to successfully add the structurant to the composition to form lamellar phase because both

Beerse et al. and Puvvada et al. teach compositions comprising emollient particles (e.g. silicone oil). See col. 17, lines 33-63.

Thus, it would have been obvious to a person of skill in the art at the time the invention was made to create the instant claimed invention with reasonable predictability.

***Nonstatutory Obviousness-Type Double-Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 1010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to

be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1, 3-6, 9, 11-16 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-6, 8-12, 14-15, and 18-20 of copending application 10/703,709, in view of Beerse et al.; the above discussion of Beerse et al. is incorporated by reference. Although the conflicting claims are not identical, they are not patentably distinct from each other because the instant claims are either anticipated by, or would have been obvious in view of the referenced claims.

In particular, reference 1 is directed to a skin care or cleaning packaged product essentially comprising the instant claimed composition. Unlike the instant claims, the reference claims are directed to a packaged product comprising a container having two chambers, wherein the first chamber contain the dispersed phase, the continuous phase, and an organophilic particle stabilizer contained in the dispersed phase, and wherein the second container containing water. In spite of this difference, it would have been obvious to a person of skill in the art at the time the invention was made to create the instant claimed invention because it is routine in the art to package skin care compositions in packages and to separate incompatible components.

This is a provisional obviousness-type double patenting rejection because the conflicting claims of the copending applications have not in fact been patented.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Charlesworth Rae whose telephone number is 571-272-6029. The examiner can normally be reached between 9 a.m. to 5:30 p.m. Monday to Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sharmila G. Landau, can be reached at 571-272-0614. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR.

Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have any questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 800-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

20 November 2008  
/C. R./  
Examiner, Art Unit 1611

/Sharmila Gollamudi Landau/

Application/Control Number: 10/730,218

Page 23

Art Unit: 1611

Supervisory Patent Examiner, Art Unit 1611